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IN THE
COURT OF APPEALS OF INDIANA

ROBERT S. PHILLIPS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0607-CR-602
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0601-FA-31

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Robert S. Phillips appeals his sentence for child molesting as a class A felony.[1] Phillips raises four issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion in sentencing Phillips;

II. Whether Phillips's sentence is inappropriate in light of the nature of the offense and the character of the offender; and

III. Whether the trial court was biased in sentencing Phillips.

We affirm.[2]

The relevant facts follow. In January 2006, the State charged Phillips with child molesting as a class A felony for having sexual intercourse and/or deviate sexual conduct with his eight-year-old niece. The State also charged Phillips with child molesting as a

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[1] Ind. Code § 35-42-4-3 (2004) (subsequently amended by Pub. L. No. 216-2007, § 42 (eff. July 1, 2007)).

[2] Phillips included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 7-19. We remind Phillips that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

class A felony for performing or submitting to deviate sexual conduct with his seven-year-old nephew. Phillips pled guilty to child molesting as a class A felony involving his niece. At the guilty plea hearing, Phillips admitted that he had touched his niece's genital area approximately twenty times, that he had sexual intercourse with her on approximately six occasions, that he sucked on her breasts on one occasion, and that he forced his penis into her mouth on one occasion.

At the sentencing hearing, the trial court found that Phillips's criminal history was an aggravating factor and that his remorse and guilty plea were mitigating factors. The trial court found that the aggravating factor far outweighed the mitigating factors and sentenced Phillips to fifty years in the Indiana Department of Correction.

I.

The first issue is whether the trial court abused its discretion in sentencing Phillips. The Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence –

including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

Phillips first argues that the trial court did not give proper weight to the aggravator and mitigators. Under Anglemyer, this argument is not subject to review. See id.

Phillips next argues that the trial court failed to consider his character as a mitigating factor. According to Phillips, he has changed his life since his arrest for this offense. A trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing. Anglemyer, 868 N.E.2d at 492. When asked by the trial court to list the proposed mitigators at the sentencing hearing, Phillips did not raise this issue. Thus, the trial court did not abuse its discretion in failing to consider it.

Moreover, "[t]he finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). Despite

Phillips's failure to raise the issue, we note that this proposed mitigator is similar to a determination of credibility. We will accept the trial court's credibility determination unless there is evidence of some impermissible consideration by the court. Pickens v. State, 767 N.E.2d 530, 534-535 (Ind. 2002). The trial court was in the best position to judge Phillips's alleged changes to his character. We cannot say that this proposed mitigator is significant or clearly supported by the record. Therefore, the trial court did not abuse its discretion.

II.

The next issue is whether Phillips's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Phillips traumatized his eight-year-old niece by touching her genital area approximately twenty times, having sexual intercourse with her on approximately six occasions, sucking on her breasts on one occasion, and forcing his penis into her mouth on one occasion. At the sentencing hearing, the niece's mother testified that she attempted to show the courtroom to her daughter the week before the sentencing hearing. However, her daughter "vomited all the way" to the courthouse because she was scared to see Phillips. Transcript at 25.

Our review of the character of the offender reveals that Phillips has a significant criminal history of sexual offenses. In 1987, Phillips was convicted of rape as a class A felony, criminal deviate conduct as a class A felony, and criminal confinement as a class B felony. Phillips was sentenced to an aggregate sentence of thirty years with ten years suspended. In 1988, Phillips was again convicted of rape as a class B felony. He was sentenced to ten years in the Indiana Department of Correction with four years suspended. In 2001, Phillips was charged with child exploitation as a class D felony but that charge was dismissed as part of an agreement to revoke his probation. Phillips was sentenced to six years for the probation revocation.

Phillips argues that the maximum sentences should be reserved for the worst offenders. The Indiana Supreme Court has observed that "the maximum possible sentences are generally most appropriate for the worst offenders." Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002).

> This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id.

Phillips contends that he is not one of the worst offenders because the victim was not "tortured or burned," she was not "beaten," and "[t]here were not multiple victims." Appellant's Brief at 8. Given Phillips's criminal history and his actions against his niece, we must conclude that Phillips does fit within the class of offenses and offenders that

warrant the maximum punishment. After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Garland v. State, 855 N.E.2d 703, 711 (Ind. Ct. App. 2006) (holding that the maximum sentence for child molesting was not inappropriate in light of the nature of the offenses and his character), trans. denied.

III.

The final issue is whether the trial court judge was biased against Phillips. The law presumes that a judge is unbiased and unprejudiced. James v. State, 716 N.E.2d 935, 940 (Ind. 1999). When a judge's impartiality might reasonably be questioned because of personal bias against a defendant or counsel, a judge shall disqualify himself or herself from a proceeding. Id.; Ind. Judicial Conduct Canon 3(E)(1)(a). The test for determining whether a judge should recuse himself or herself is "whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality." James, 716 N.E.2d at 940. The record must show actual bias and prejudice against the defendant before a conviction will be reversed on the ground that the trial judge should have been disqualified. Flowers v. State, 738 N.E.2d 1051, 1061 (Ind. 2000), reh'g denied. Furthermore, a "defendant must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced the defendant's case." Id. at 1061. An adverse ruling alone is insufficient to show bias or prejudice. Id. at 1060 n.4.

Phillips contends that the trial judge was biased based upon his statement at the sentencing hearing that Phillips was a "sexual predator," that no treatment would help, that the only remedy was to "lock [Phillips] up," and that he wished he could give Phillips a sentence longer than fifty years. Transcript at 38-39. Phillips contends that his sentence was aggravated because of the trial judge's desire to send a personal philosophical or political message. We disagree and conclude that the trial judge was merely commenting upon Phillips's extensive history of sexual offenses and the fact that prior treatment had been unsuccessful in stopping Phillips's behavior. Phillips has failed to establish that the trial court judge was biased or that he aggravated Phillips's sentence for improper reasons. See, e.g., Flowers, 738 N.E.2d at 1061 (holding that the defendant "made no such showing" that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced the defendant's case).

For the foregoing reasons, we affirm Phillips's sentence for child molesting as a class A felony.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur